No. 87-1318

In The
Supreme Court of the United States
October Term, 1987

VOLT INFORMATION SCIENCES, INC.,
Appellant,

vs.

THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY, a body having corporate powers,
Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

MOTION TO DISMISS OR AFFIRM APPEAL

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QUESTIONS PRESENTED

A state court interpreted a choice of law clause in a private agreement, and enforced the parties' agreement to arbitrate in accordance with the terms to which the court found they had agreed.

1. Does a state court interpretation of a choice of law clause in a private agreement present a substantial federal question?

2. Does a state court's enforcement of an agreement to arbitrate in accordance with its terms present a substantial federal question?

LIST OF RELATED COMPANIES REQUIRED BY UNITED STATES SUPREME COURT RULE 28.1

Pursuant to Supreme Court Rule 28.1, Appellee The Board of Trustees of the Leland Stanford Junior University lists the following non-wholly owned subsidiary and affiliate:

Stanford University Hospital

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court, appellee The Board of Trustees of the Leland Stanford Junior University moves to dismiss this appeal or to affirm the judgment of the California Court of Appeal, Sixth Appellate District, in this case. The motion is based on the grounds that:

1. The appeal fails to raise a substantial federal question and the judgment rests on adequate non-federal bases (Rule 16.1(b)); and

2. The purported federal question is so insubstantial that no further argument is warranted. (Rule 16.1(b), (d))

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CONSTITUTIONAL PROVISIONS PURPORTEDLY INVOLVED

The constitutional and statutory provisions involved in this case are the Supremacy Clause of the United States Constitution (U.S. Const., art. VI, cl. 2), sections 1-4 of the Federal Arbitration Act (9 U.S.C. §§ 1-4), and section 1281.2(c) of the California Code of Civil Procedure. These provisions are set forth in Appendix H of the Appendices To Jurisdictional Statement of Appellant ("App. —").

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STATEMENT OF THE CASE

The underlying dispute arises out of a construction project at the Stanford University campus adjoining Palo

Alto, California. Pursuant to a written contract with appellee The Board of Trustees of the Leland Stanford Junior University ("Stanford"), appellant Volt Information Sciences, Inc. ("Volt") was the construction contractor for the project. (JA 3, 17-117)[1] During the course of the construction Stanford terminated the Volt contract because of Volt's material breaches of it. (JA 3, 118-119) Volt then requested reinstatement, and after various negotiations, Stanford and Volt signed a reinstatement agreement. (JA 3, 4, 120-21) In the reinstatement agreement Volt agreed it would not seek any additional compensation for work it performed in order to remedy its earlier breaches of the construction contract. (JA 3, 120-21)

On August 27, 1986, Volt presented Stanford with a demand for arbitration of a claim that seeks additional compensation for the work Volt performed to remedy its own breaches of the construction contract and for which it agreed it would not seek additional compensation. (JA 4, 185-206) Thus Volt violated the reinstatement agreement and ignored its promise to be responsible for the necessary corrective work. Now Volt claims that the corrective work was necessary because construction drawings and project management provided to Stanford by defendants Brian-Kangas-Foulk & Associates ("BKF&A") and Telecommunications International, Inc. ("TII") were inadequate or improper, and for other reasons. (JA 183, 187-88) Volt seeks to hold Stanford, as the owner of the

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[1] The Parties' Joint Appendix filed in the California Court of Appeal is cited here as "JA —."

property on which the project was constructed, liable for the claimed errors of TII and BKF&A.

The contract between Stanford and Volt provides that it shall be governed by the law of "the place where the Project is located," California. (JA 49) Subject to the provisions of the governing law and the rules of the American Arbitration Association, the parties also agreed to arbitrate disputes "relating to this contract or the breach thereof." (JA 61) The contracts between Stanford and TII and Stanford and BKF&A contain no arbitration provision. (JA 126-134, 135-143, 144-150)

Volt goes into some detail as to the presumed intent of the parties to this construction project (Jurisdictional Statement ["Jur. St."], pp.54-57). Volt complains that Stanford could have avoided the problem of duplicative litigation by "inserting a proviso excusing it from its duty to arbitrate. . . ." (Jur. St., p.55). Volt has an odd view as to how agreements are made. One party does not just "insert" provisions in them; both parties to them negotiate terms, and agree to some but not others. Stanford, TII and BKF&A did not agree to arbitrate. That is the fact that matters here.

On August 27, 1986, Stanford and Volt concluded settlement discussions seeking to resolve their dispute. That is the same day on which Volt filed its arbitration demand. (JA 183, 185-206) One week later, on September 4, 1986, Stanford filed its complaint in the Superior Court, naming as defendants Volt, BKF&A and TII. (JA 1-150) The complaint states claims against Volt based upon, among other things, fraud, estoppel, breach of contract, and bad faith denial of the existence of a contract. It also asks

for a judgment declaring that, if Stanford is held liable to Volt on account of TII or BKF&A's errors, then TII and BKF&A are required to indemnify Stanford for any amounts it must pay Volt.

Stanford could not arbitrate its indemnity claims against TII and BKF&A, because it had no arbitration agreement with either of them. If Stanford were forced to arbitrate Volt's claims alone before an arbitrator, the arbitration could result in a determination that TII's and BKF&A's drawings or TII's project management were inadequate, and an award for Volt. If Stanford then were forced separately to litigate its indemnity claims against TII and BKF&A in court, TII and BKF&A might not be bound by the arbitrator's award. A court or jury could find that their drawings and management were adequate, and deny indemnity.

Stanford filed its lawsuit in Superior Court to avoid the danger of those conflicting results and to resolve all these disputes at the same time and place. A court in California was the only forum in which Volt's claims against Stanford and Stanford's claims against Volt, TII and BKF&A all could be resolved at the same time and place. Volt moved to stay the Superior Court proceeding while the arbitration went forward, and Stanford sought an order under CCP § 1281.2(c) staying the arbitration while the litigation went forward.

Volt argued that the clause in the parties' agreement providing that the agreement shall be governed by the "law of the place where the Project is located" did not mean California law, where the Project is located. Rather, Volt said, the agreement was in interstate commerce; the

Federal Arbitration Act accordingly applied to it, absent the choice of law clause; and the choice of law clause changed nothing, since it meant (somehow) that the Federal Arbitration Act, not the California Act, governed. The Federal Act contains no counterpart provision to CCP § 1281.2(c). Accordingly, Volt's argument concluded, § 1281.2(c) did not apply here.

Volt also claimed that if California law and thus CCP § 1281.2(c) did apply, the Superior Court ought not exercise its discretion to issue a stay under it.

The Superior Court held that § 1281.2(c) did apply, exercised its discretion, and stayed the arbitration under it. Volt appealed to the Sixth Appellate District. (JA 255) The Court of Appeal enforced the parties' choice of law provision; held that the parties had agreed by it to arbitrate only in accordance with California law and thus CCP § 1281.2(c) applied under it; held that the Superior Court's stay order was within its discretion under CCP § 1281.2(c); and affirmed that order.

Volt filed a petition for review in the California Supreme Court (App. G). On December 17, 1987, the Supreme Court issued its order denying Volt's petition for review (App. B). By the same order, the court directed that the court of appeal's opinion should not be published in the permanent edition of the official California Appellate Reports (*id.*), and, accordingly, under California law the decision is not precedent in any respect as to any matter. California Rule of Court 977(a). Volt filed its notice of appeal to this Court on January 14, 1988 (App. D).

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ARGUMENT

I. REVIEW BY THIS COURT WOULD BE UNWARRANTED

A. Introductory Summary.

This case presents no substantial federal question for review by this Court. The California Court of Appeal simply followed the settled federal and state rule that arbitration is a matter of agreement, and that parties cannot be forced to arbitrate a dispute they have not agreed to arbitrate. Accordingly, the Court enforced the parties' agreement, including its choice of law clause, according to its terms.

Appellant Volt suggests that there is a Supremacy Clause issue here, but there really is not, and Volt ultimately identifies none. Thus Volt does not dispute that settled and supreme federal/state rule of law, or argue that the Court of Appeal did not follow it. Instead, Volt contends that the Court's reading of the choice of law clause was "unsound;" the "principal issue" presented by this case, Volt argued to the California Supreme Court, was whether the court misread that clause. (App. G, p.1) But the Court's reading was clearly right and Volt's clearly wrong. Moreover, right or wrong, a state court's reading under state law of a choice of law clause in a private agreement does not present a question for review by this Court.

Volt asserted a "secondary issue" to the California Supreme Court with respect to the interpretation of Section 1281.2(c) of the California Code of Civil Procedure. (App. G, p.1) That provision grants the superior courts

discretion to stay arbitration when one party to an arbitration agreement is also a party to related litigation with third persons who have not agreed to arbitrate, and who therefore cannot be brought into the arbitration. Volt contended that § 1281.2(c) does not apply when the party "resisting arbitration has himself initiated the litigation with such third persons" after the demand for arbitration is filed. (App. G, p.2)

There was nothing to that contention; the California statute itself answered it. The statute provides that it applies whether the party "resisting arbitration" initiates the litigation after the demand is filed or before. The Superior Court applied the statute in accordance with its terms, and stayed the arbitration. That stay order was well within the Court's discretion. It certainly presents no substantial federal question for review by this Court, and Volt does not raise the issue here.

Moreover, these non-existent questions are presented by a decision which in essence does not exist. The California Supreme Court directed that the Court of Appeal's opinion should not be published in the permanent edition of the official California Appellate Reports. The decision therefore has no precedential value in any matter. Non-existent issues presented by a non-existent decision ought not occupy this Court's time.

B. Volt's "Principal" Argument Is Wrong.

The Court of Appeal interpreted the parties' agreement under state law, and determined under it that the parties agreed that the "laws of California, of which section 1281.2 is certainly a part, are to govern their con-

tract." (App. A, p.4) The Court then enforced that agreement in accordance with its terms. That was exactly what the law, state and federal, required the Court to do.

1. The Court's Decision Was Compelled By The Most Basic Principles Of Abitration Law.

A court order enforcing the parties' agreement in accordance with its terms in no way conflicts with the Federal Arbitration Act ("FAA"), the Supremacy Clause or any other provision of federal law.[2] To the contrary, courts are compelled to honor the parties' agreement by the most basic principles of arbitration law, federal and state.

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[2] Volt claims that but for the parties' agreement, "there is no question that" federal law would govern the disposition of this case. (Jur. St., pp.23-24) The Court of Appeal assumed that to be true (App. A, pp.3-4), but there is substantial question in respect to it. *Southland Corp. v. Keating, infra,* 465 U.S. 1, 16 n.10 (1984), expressly did not "hold that §§ 3 and 4 of the [federal] Arbitration Act [the *procedural* provisions of the Act] apply to proceedings in state courts." No Supreme Court case so holds. Moreover, §§ 3 and 4 by their terms do not refer to state courts; they refer to "Courts of the United States" and "United States District Court." And indeed, it would be extraordinary for Congress to intend federal procedural rules to apply in state court; in particular it would be extraordinary for Congress to require a state to entertain piecemeal litigation when its legislature has said, through California Code Civ. Proc. § 1281.2(c) here, that it disapproves of it.

Volt claims that *Perry v. Thomas, infra,* — U.S. —, 107 S. Ct. 2520 (1987), resolves this issue (Jur. St., p.26 n.), but it does not mention it, much less purport to resolve it. In fact, *Perry's* holding was based on § 2, the substantive provision of the Act, not §§ 3 and 4. *Id.* at 2525-26.

We agree that this Court need not reach the issue, because the appeal lacks merit without regard to it.

Arbitration is a matter of agreement. A court cannot force parties to arbitrate a dispute they have not agreed to arbitrate. They can agree to arbitrate in any way they want; thus they can agree to arbitrate some disputes and not all, or in some circumstances and not all, or not at all.

Nothing in the FAA changes any of that or takes those rights away. Again, the contrary is so. The FAA is meant to enforce the parties' agreement, whatever it is, no less and no more than it is. Thus the FAA prohibits a state from refusing to enforce an arbitration agreement subject to the FAA in accordance with the agreement's terms. The FAA does not mandate a state to disregard the parties' agreement, much less compel them to arbitrate a dispute they have not agreed to arbitrate or in a way they have not agreed to arbitrate. Volt's own authorities make that clear. See *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 219 (1985) (emphasis added):

> "*The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate.* We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. *The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements.*"

Accord, *Prima Paint Corp. v. Flood & Conklin,* 388 U.S. 395, 402, 406 (1967) (claims for fraudulent inducement are for the arbitrator, not the Court, "except where the parties otherwise intend"; no one even claimed that parties are "not entirely free" to otherwise intend and "so con-

tract"); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (federal court should compel arbitration even if that causes piecemeal litigation "where necessary to give effect to the arbitration agreement"); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984) (state cannot refuse to arbitrate Franchise Act claims where parties "agreed" to arbitrate them); *Perry v. Thomas*, — U.S. —, 107 S.Ct. 2520, 2526 (1987) (state cannot refuse to arbitrate broker's wage claim where parties agreed to arbitrate it; the purpose of the federal Act "was to enforce private agreements into which parties had entered").

California law is exactly the same. See, e.g., *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal. App. 3d 19, 32 (1977):

> "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

Accord, *O'Malley v. Wilshire Oil Co.*, 59 Cal. 2d 482, 496 (1963); *Chan v. Drexel Burnham Lambert, Inc.*, 178 Cal. App. 3d 632, 640, 645 (1986); App. A, p.10.

The Court of Appeal simply followed those basic principles of arbitration law, and enforced the parties' agreement in accordance with its terms. It held "that the parties are at liberty to choose the terms under which they will arbitrate, and such a choice will not run afoul of the FAA." App. A, pp.10-11. It concluded that the Court would violate those basic principles of arbitration law were it not to enforce the parties' agreement, including its choice of law clause, in accordance with its terms. App. A, pp.11-12.

> "Were the federal rules to be imposed in this case to override the parties' choice of law, the effect would be to force the parties to arbitrate where they agreed not to arbitrate. This result is not only inimical to the policies underlying state and federal arbitration law, . . . it also violates basic principles of contract law."

Accord, *Chan v. Drexel Burnham Lambert, Inc.*, above, 178 Cal. App. 3d at 640, 645:

> "Arbitration is recognized as a matter of contract, and a party cannot be forced to arbitrate something in the absence of an agreement to do so." (*Vespe Contracting Co. v. Anvan Corporation* (E.D. Pa. 1975) (399 F. Supp. 516, 520.) The [federal] Act " 'does not dictate that we should disregard parties' contractual agreements . . . outlining the boundaries of the areas intended to be arbitrable.' " (*Pasbs v. Group Health, Inc.* (S.D.N.Y. 1977) 442 F. Supp. 937, 940), and there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate. (*Delta Lines, Inc. v. International Brotherhood of Teamsters* (1977) 66 Cal. App. 3d 960, 966 [136 Cal. Rptr. 345]).

Volt does not dispute those basic principles, or contend that they do not apply here. Indeed, Volt says that notwithstanding the FAA, Stanford could have dealt with "the possibility of potentially duplicative proceedings resulting from disputes with other participants in the project" with whom it had no agreements to arbitrate; all Stanford need have done, Volt states, is to insert "a proviso excusing it from its duty to arbitrate" to deal with the "problem of duplicative litigation." (Jur. St., p.55) The Court of Appeal held that that is exactly what Stanford and Volt in effect agreed to do.

"If the parties here had expressly stated in their agreement that they wished to arbitrate only those disputes between themselves which did not involve third parties not bound by the arbitration agreement, this provision would presumably be enforceable. *In our view they accomplished the same thing by choosing to be governed by California law, thus incorporating the California rules of civil procedure governing arbitration agreements.*" (App. A, p.11.) (Emphasis added)

2. Volt's Construction Of The Choice Of Law Provision Is Wrong, And Presents No Question Appropriate For Review In This Court.

Thus Volt does not attack the settled and controlling principles on which the Court of Appeal's decision is based. Instead, it complains that the Court of Appeal concluded under state law that the parties consciously chose to be governed by "California law" and not otherwise applicable federal law, and that "the Court's interpretation of this contractual language is plainly unsound. . . ." "[A]n examination of the probable intent of the parties with respect to the laws that would govern their agreement," Volt goes on, "supports the conclusion that federal law should govern this controversy." (Jur. St., pp.54-57)

Volt is way off base. The agreement provided that it "shall be governed by the law of the place where the Project is located." The place the project was located was California. There is no place called federal. Therefore the contract clearly means that California law, the place of the project, governs. The Court of Appeal had "no doubt" about that (App. A, p.5), and, besides the fact that the clause clearly means that, the parties, who contracted in California, must be taken to have known it;

the year before their "agreement was forged," the California Court of Appeal so held. *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co.*, 140 Cal. App. 3d 251 (1983) (App. A, pp.5-6).[3]

But, Volt goes on, the choice of law clause really means that California-law-plus-federal-law-that-would-be-applicable-but-for-the-clause governs. (Jur. St., pp.51-59) The clause, however, does not say that, and the clause exists; there is no reason to interpret the clause but for the clause. Still, Volt continues, citing to the dissenting opinion, federal law and in particular the FAA are part of California law by "the fundamental constitutional principle that federal law is the 'supreme law of the land'." (Jur. St., p.57) But that argument is circular and assumes the premise it is meant to prove. The Supremacy Clause does not mandate that the FAA apply where, as

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[3] Volt asserts that the parties would not have been aware of Calif. Code Civ. Proc. § 1281.2(c) because those who "prepared" the contract were not lawyers, citing to JA 22. (Jur. St., pp.54-55) JA 22 is simply the signature page of the contract. There is no evidence to support Volt's assertion, and it is in fact false.

The Court of Appeal pointed out that "courts in other states faced with identical language have reached the same result we do here." (App. A, pp.5-6) Volt agrees that one of those cases so held, *Standard Co. v. Elliott Constr. Co.*, 363 So. 2d 671 (La. 1978), but objects that the others, *Eric A. Carlstrom Constr. Co. v. Independent School Dist. No. 77*, 256 N.W. 2d 479 (Minn. 1977) and *Lane-Tahoe, Inc. v. Kindred Constr. Co.*, 536 P. 2d 491 (Nev. 1975) have no "bearing"; "the possible application of federal law" was not at issue there, Volt says. (Jur. St., p.34 n.) Volt misses the point. *Carlstrom* and *Lane-Tahoe* both hold that a clause identical to the one at issue here means that arbitration is to proceed in accordance with the laws of the *state* in which the project is located. 256 N.W. 2d at 479; 536 P. 2d at 493. That is the point.

here, the parties agree otherwise. The Supreme federal law mandates that agreements to arbitrate be enfored according to their terms. The parties agreed that California law applies. The Court of Appeal enforced that agreement as the supreme federal law—and state law—compelled it to. (Subpart 1, above)

Thus Volt's interpretation of the contract is plainly wrong. Even if it were not, whether the Court of Appeal properly interpreted the "probable intent of the parties" obviously presents a fact question. A fact question is not a substantial federal question for review by this Court. See *Cal. Retail Liquor Dealers Assn. v. Midcal Alum.*, 445 U.S. 97, 111-12 (1980). That is particularly so here because the fact question relates to a simple matter of contractual interpretation of a choice of law clause in a private commercial contract, a matter governed exclusively by state law. See *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (conflict-of-laws rules to be applied in federal court must conform to those prevailing in state courts.)[4] Indeed, Volt agrees that this case "depend[s]

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[4] Volt places great reliance on the fact that this Court held that a choice of law clause containing the phrase "law of the jurisdiction" includes federal law. *Fidelity Fed. S. & L. Assn. v. de la Cuesta*, 458 U.S. 141, 157 n. 12 (1982).

First of all, Volt ignores the fact that the choice of law clause in the present case is different from the one in *de la Cuesta*. This clause specifies the laws of a physical place, the "place where the project is located." The *de la Cuesta* clause spoke to the law of a "jurisdiction" in the abstract. That semantic difference, however, is the beginning, not the end. The end is that Volt is asking this Court to review a simple matter of contractual interpretation in an area (choice of law) governed exclusively by state law. *See Day & Zimmermann, Inc. v. Challoner*, above, and *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97, 111 (1980).

upon the interpretation given by the court to the choice-of-law clause." (Jur. St., p.45) Volt raises no issue worthy of this Court's review.

Volt argues last, that unless its contention is made law any party can "evade his contractual duty to arbitrate by commencing litigation involving non-arbitrable ancillary claims against third persons." (Jur. St., p.43) That is nonsense. Stanford did not evade its "contractual duty"; Volt and Stanford agreed that California law, and thus, Cal. Code Civ. Proc. § 1281.2(c), applied. Stanford asked the Court to enforce that agreement in accordance with its terms, and the Court did. Volt tried to evade that agreement. The Court did not permit it to.

The Superior Court enforced the parties' agreement and exercised its discretion under CCP § 1281.2(c), soundly.[5] There was no abuse of discretion, and the Court of Appeal so held. (App. A, p.18) Volt says nothing to suggest that there was. This state court's discretionary application of a state statute to a private agreement in accordance with the agreement's terms presents no question to this Court to review.

C. The Court of Appeal's Decision Has No Precedential Effect.

The California Supreme Court directed that the Court of Appeal's opinion should not be published in the per-

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[5] Volt says § 1281.2(c) "afford[ed] [Stanford] a legal excuse from compliance with the duty to arbitrate," and that it is a "procedural device." (Jur. St., p.44) Volt is just name-calling. Section 1281.2(c) is meant to avoid piecemeal litigation arising out of the same transaction, and to avoid conflicting rulings on common issues of law and fact. The California legislature determined that those were worthy aims. Obviously they are.

manent edition of the official California Appellate Reports. Accordingly, that decision has no precedential value:

> [Unpublished opinions] An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding. . . . California Rule of Court 977(a).

In short, Volt asks this Court to review a decision which creates no conflict in the case law, decides no important federal question, presents no other "special and important" consideration (Rule 17.1) and in essence does not exist. Indeed, the decision does not even determine these parties' rights on the merits; there has been no trial, and the parties' rights remain to be adjudicated. To borrow from Justice Roberts, this is a decision which should be treated like "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). It is not a decision with which this Court need occupy its time.[6]

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[6] Volt urges this Court to avoid a summary disposition of this case because it would amount to an "adjudication on the merits that establishes a binding precedent for the adjudication of all future cases raising the same issue." The California Supreme Court's order makes that argument a non sequitur: one cannot use as precedent what cannot be cited as precedent.

In any event, Volt has not accurately stated the law in this regard. In *Edelman v. Jordan*, 415 U.S. 651, 671 (1974), the Court observed that, while summary affirmances not discussing the issues "obviously are of precedential value, . . . [e]qually obviously they are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), makes clear that "a summary affirmance is an affirmance of the judgment only," not necessarily of "the reasoning by which it was reached."

CONCLUSION

This appeal should be dismissed or the judgment below should be summarily affirmed.

Dated: March 4, 1988.

Respectfully submitted,

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